79-6376

Supreme Court, U. S.
FILED
APR 8 1980
MICHAEL RODAK, JR., CLERK

IN THE UNITED STATES SUPREME COURT

MARVIN E. BARNETT,

Petitioner Pro Se,

Versus

THE STATE OF OKLAHOMA and
PETER A. DOUGLAS, Warden et. al.,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND SUPPORTING AFFIDAVIT (Pursuant to U.S.C. 1915)

STATE OF OKLAHOMA)
) ss:
COUNTY OF CLEVELAND)

I hereby apply for leave to pursue this action under 28 U.S.C. 1254 and U.S.C. Const. Art. 3, § 2, cl 2, without prepayment of fees and costs or giving security therefor.

In support of my application, I state under oath that the following facts are true:

(1.) I am the party initiating said action and believe that I am entitled to redress.

(2.) The nature of this action is a petition for writ of Certiorari.

(3.) I am unable to prepay the costs of this action or give security therefor because of my poverty.

(4.) I have no assets or funds which could be used to prepay the fees or costs.

(5.) During the proceeding twelve months the only monies I have received is a small amount from my family for mantaining my personal hygiene.

Marvin E. Barnett
Signature of Movant

Subscribed and sworn to before me this 3 day of April 1980.

My commission expires: 1-28-84 1980.

Doyle Edward Blythe
NOTARY PUBLIC

CERTIFICATE

I hereby certify that the movant herein has cash and securities in the amount of $2.45 on account to his credit at the penal institution where he is confined.

Doyle Edward Blythe
Authorized officer of Penal Institution

Case Manager I
Title

IN THE UNITED STATES SUPREME COURT

MARVIN E. BARNETT,
Petitioner Pro Se,

Versus

THE STATE OF OKLAHOMA and
PETER A. DOUGLAS, Warden et. al.,
Respondents.

PETITION FOR WRIT OF CERTIOTATI

CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TINTH CIRCUIT

Comes now, Marvin E. Barnett, the petitioner in the above entitled action, acting totally prose, and states that he is a prisoner of the State of Oklahoma at Lexington Assessment and Reception Center, Lexington, Oklahoma. The petitioner is incarcerated as a result of a judgement and sentence of life from Oklahoma County District Court, Oklahoma rendered on the 3rd day of July 1965, case no. CRF-30301. Appeals were filed seeking to secure petitioner's right to a direct appeal under the due process and equal protection clause. A-14698, A-14727, 446 P. 2d 89. The appeals were denied as was hes writ of Habeas Corpus in the Western District of Oklahoma, CIV-78-1006-D.

The petitioner then appealed the Federal District Court's ruling to the United States Tenth Circuit. Case no. 79-1283; That Court affirmed on the 7th day of March 1980. See appendix "A". The petitioner does not have a copy of his prior decisions however, he has filed an application for the Court of Appeals to transmit his original trial transcript and record on appeal. See appendix "B".

The petitioner respectfully prays that a writ of Certiorari be issued to review the opinion and judgement of the United States Court of Appeals for the Tenth Circuit entered on the 7th day of March 1980.

JURISDICTION

The decision rendered on March 7th, 1980, by the United States Court of Appeals for the Tenth Circuit is in direct conflict with other Courts of Appeal on the same matter. Jurisdiction of this Court is invoked under U.S.C. title 28 § 1254 and U.S.C. Const. Art. 3 § 2, cl 2. Chaffin v. Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L.Ed. 2d 714 (1973). National Cable Television Asso. v. United States 415 U.S. 336, 94 S.Ct. 1146, 39 L. Ed. 2d 370.

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the petitioner was denied due process and equal protection when he was denied the right to a direct appeal through no fault of his own?
2. Whether or not the petitioner was denied effective assistance of counsel on appeal when his attorney abandoned him without notice to either petitioner or the courts?
3. Whether or not the lower courts systematically denied the petitioner meaningful access to the courts by denying him a copy of the original 1965 trial transcripts; said denial making a direct appeal impossible for a person indigent and unschooled in the law?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertain by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defence.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The precise matter complained of here is that your petitioner has been denied effective assistance of counsel and due process under the law. At all times the petitioner desired an appellate review of his conviction. None of the lower courts have touched upon the question of abandonment raised by the petitioner. Petitioner relies heavily upon Scobie v. State, 239 F. Supp. 646 (E. D. Okla.) wherein that court held:

> Where convicted state prisoner had been deprived of his right to appeal by his attorney who alone made the decision not to appeal against the petitioner's clearly expressed desire to have appellate review of his conviction and sentence, state prisoner did not have effective assistance of counsel on appeal and justice required that state prisoner be afforded his right to appeal with reasonable dispatch or that he be released from custody.

The denial ones right to counsel on appeal constitutes a violation of the 14th amendment's due process clause. The violation caused by abandonment has left the petitioner not only without effective assistance of counsel on appeal but just as important petitioner has been denied a copy of the original 1965 trial transcripts; so necessary for effective and adequate access to the courts.

ARGUMENT AND AUTHORITIES

In this instant case the United States Court of Appeals for the Tenth Circuit affirmed the decisions of the district Court which said petitioner had not been denied effective assistance of counsel on appeal, eventhough the original record will reflect no appeal was ever filed and the petitioner nor the court was notified of the attorney's action or inaction. The record will reflect that the petitioner has never had a direct appeal on the merits of this case; a very critical stage in the criminal process. The court uses Plaskett v. Page, 439 F. 2d 770 (10th Cir. 1971); this decision is in direct conflict with other Courts of Appeals regarding the question of abandonment on appeal by retained counsel.

Petitioner must rely on Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L. Ed. 2d 72, because he is indigent and unschooled in the law; all his petitions have been pro se without any assistance from anyone trained in the law.

It cannot be said that the petitioner herein, had effective assistance of counsel on appeal. When counsel improperly abandons his client without notification to him or the trial court and fails to inquire as to whether the client is able to hire another attorney, the representation can hardly be termed effective. Douglas v. Calif., 372 U.S. 353, 83 S. Ct. 814; and Anders v. Calif., 386 U.S. 738, 87 S. Ct. 1396.

The denial of ones right to counsel on appeal merely because originally he had privately retained counsel and subsequently became indigent and unable to hire counsel at his own expense, there is no sound and/or rational basis for afforded him less protection of his appellate rights, than would be afforded a defendant who was initially indigent and had the benefit of appointed counsel from the beginning of the criminal proceedings.

The Sixth Circuit in Boyd v. Cowen, 394 F. 2d 388 (1974) held that regardless of whether counsel is privately retained or court appointed, there is a constitutional denial of right to appeal by reason of failur of counsel to perfect an appeal. The Sixth Circuit gave particular emphasis to the fact that the duty of an attorney to communicate with his client fully and promptly is particularly compelling when the latter is incarcerated. This is of course precisely the case of the petitioner.

As the court state in Boyers v. Coiner, 309 F. Supp. 1064 (S. D. W.Va. 1970):

> We regard a sound law that when employed counsel fails to take in appeal within the time permitted, without clearly informing his client of his intentions not to do so, and without assisting or offering to assist the client in having other counsel appointed in his place, the retained counsel has breached his duty to his client and the latter's constitutional right to effective assistance of counsel on appeal under the 6th amendment has been violated.

The following cases are in direct conflict with the decision rendered in this instant case by the Court of Appeals for the Tenth Circuit:
United States ex. rel. Maselli v. Reinsake, 383 F. 2d 129 (2d Cir. 1967); Turner v. North Carolina, 412 F. 2d 486 (4th Cir. 1969); Williams v. Coiner, 392 F. 2d 210 (4th Cir. 1968); Chaffin v. United States, 469 F. 2d 634 (5th Cir. 1972); Atilus v. United States 406 F.2d 694 (5th Cir. 1969).

The facts set forth that there was an abandonment of petitioner's appeal by his privately retained counsel, and that abandonment took place shortly after the date of the petitioner's sentencing. When petitioner's counsel abandoned this appeal it was done without prior notice to him or the trial court.

CONCLUSION

Wherefore premises considered, your petitioner prays that this Honorable Court reverse the decision rendered by the Court of Appeals for the Tenth Circuit and/or grant him full appellate review of his original 1965 trial; which he is entitled to. This and any other relief that this Honorable Court deems fair and just.
It is so prayed.

Respectfully submitted,
Marvin E. Barnett
Marvin E. Barnett #72361
Petitioner pro se

VERIFICATION

STATE OF OKLAHOMA)
) ss:
COUNTY OF CLEVELAND)

I, Marvin E. Barnett, the undersigned being first duly sworn, states that he is the petitioner in the above action and that the information contained therein is true and correct to the best of my knowledge, beleif and memory.

Marvin E. Barnett
Signature of Petitioner

Subscribed and sworn to before me this 3 day of April 1980

My commission expires: 1-28-84

Doyle Edward Blythe
NOTARY PUBLIC

Appendix "A"

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
MAR 7 1980
HOWARD K. PHILLIPS
Clerk

MARVIN E. BARNETT,

Petitioner-Appellant,

v.

MACK H. ALFORD, Warden and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Respondents-Appellees.

No. 79-1283

Appeal from the United States District Court
For the Western District of Oklahoma
(Civ. No. 78-1006-D)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Marvin E. Barnett, pro se.

Jan Eric Cartwright, Attorney General, and Carol Elaine Alexander, Assistant Attorney General, the State of Oklahoma, Oklahoma City, Oklahoma, for Respondents-Appellees.

Before SETH, Chief Judge, PICKETT and McWILLIAMS, Circuit Judges.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). This cause is therefore ordered submitted without oral argument.

Appellant Barnett was convicted in 1965 in an Oklahoma state court of murder. After exhausting his state post conviction remedies, Barnett filed a petition for a writ of habeas corpus in the district court, alleging he had been denied effective assistance of counsel and his right to appeal by the failure of his retained attorney to file an appeal of his state murder conviction. Appellant alleges that although he wanted to appeal, his retained counsel did nothing. The district court dismissed Barnett's petition. We affirm.

This case is controlled by our decision in Plaskett v. Page, 439 F.2d 770 (10th Cir. 1971). As in Plaskett, appellant Barnett did not request appointment of other counsel; he does not claim to be indigent; and the state imposed no impediment to his appeal. The failure of retained counsel to perfect an appeal is neither a denial of due process nor a ground for federal habeas corpus relief. 439 F.2d at 771.

Affirmed. The mandate shall issue forthwith.

Appendix "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARVIN E. BARNETT,
Petitioner-Appellant,

vs.

Case number 79-1283

THE STATE OF OKLAHOMA and
PETER A. DOUGLAS, Warden et. al.,
Respondents-Appellees.

APPLICATION TO TRANSMIT TRANSCRIPT OF TRIAL, RECORD ON APPEAL, ALL PLEADINGS, ORDERS AND OPINIONS TO THE CLERK OF THE UNITED STATES SUPREME COURT, WASHINGTON, D.C.

Comes now, Marvin E. Barnett, the petitioner, in the above entitled and numbered cause, and Requests this Court to transmit transcript of the original trial, record on appeal, all pleadings, orders and opinions in the above styled cause.

The petitioner has filed a petition for Writ of Certiorari in the United States Supreme Court styled Marvin E. Barnett versus the State of Oklahoma and Peter A. Douglas, Warden et. al. Said Court has need of the original trial transcript, record on appeal, all pleadings, orders and opinions filed in case number 79-1283 (10th Cir.), CIV-78-1006-D (D C Okla.), Okla. County Court case 30301.

Therefore, petitioner respectfully requests this Court to order the clerk of the United States Court of Appeals for the Tenth Circuit to transmit by registered mail, return reciept requested, transcript of the original trial, record on appeal, all pleadings, orders and opinions contained in the files of the clerk of this Court in the above mentioned cause to the United States Supreme Court, Washington, D. C.

Respectfully requested,
Marvin E. Barnett
Marvin E. Barnett, #72361
Petitioner Pro Se
Rte 1 Box 260
Lexington, Oklahoma 73051

Suscribed and Sworn to before me
this 3 day of april 1980
My Commission expires: 1-28-84
Doyle Edward Blythe
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, Marvin E. Barnett, the petitioner in the above entitled action certify that a true and correct copy of the foregoing documents were placed in the prison mail deposit on the 3 day of april 1980 to Jan Eric Cartwright, attorney for the respondents.

Marvin E. Barnett
Marvin E. Barnett #72361
Petitioner Pro Se